

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Communications Assistance for Law)	ET Docket No. 04-295
Enforcement Act and Broadband Access and)	
Services)	RM-10865

To: The Commission

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel") submits this limited reply to the comments made in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking and Declaratory Ruling, which, after ten years, proposes a new direction for the implementation and enforcement of the Communications Assistance for Law Enforcement Act ("CALEA").¹

As detailed in its initial comments, Nextel supports the development of surveillance solutions for packet communications as in the public interest.² Comments by the Attorney

¹ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295, RM-10865, 69 Fed. Reg. 56976 (Sept. 23, 2004) ("NPRM"); 69 Fed. Reg. 56956 (Sept. 23, 2004) ("Declaratory Ruling"). The Office of Engineering and Technology extended the date for submission of reply comments to December 21, 2004. *Communications Assistance for Law Enforcement and Broadband Access and Services*, Order Granting Extension of Time, ET Docket No. 04-295, RM-10865, DA 04-3682 (rel. Nov. 24, 2004).

² See Nextel Communications, Inc. Comments (filed November 8, 2004) ("Nextel Comments"); See also generally, Reply Comments of Nextel Communications, Inc., *In the Matter of IP Enabled Services*, WC Docket No. 04-36 (filed July 14, 2004). In its initial comments, Nextel noted that its DirectConnect® service has been fully CALEA-compliant since 2002 and remains the only such CALEA-compliant push-to-talk ("PTT") service. Nextel also detailed its opposition to the Commission's attempt to extend CALEA to broadband Internet access or other information services,

General of the State of New York ("NY AG") and the U.S. Department of Justice ("DOJ"), however, urge the Commission to adopt rules that would shift nearly the entire cost burden associated with CALEA to carriers. In providing surveillance solutions and technical assistance, federal and state laws give carriers the right to recover their CALEA-related costs. The Commission lacks jurisdiction to inquire into such cost recovery matters.

I. ALL CALEA-RELATED COSTS ARE RECOVERABLE

A. Post-1995 Development and Implementation Costs are Recoverable

DOJ and NY AG support the Commission's position that CALEA prohibits carriers from recovering CALEA development and implementation costs for post-January 1, 1995, equipment and facilities, except where the Commission makes a determination that compliance is not "reasonably achievable."³ These commenters, however, ignore the fact that CALEA did not change the various state and federal statutes that expressly permit cost recovery.⁴ Congress stated that it specifically intended the assistance and cost recovery sections of Title 18 and Title 50 to "continue to be applied, as they have in the past, to government assistance requests related to specific orders, including, for example, the expenses of leased lines."⁵

its qualified support for trusted third party CALEA solutions and its disagreement with the Commission's reading of section 107(c), which would eliminate packet mode extensions entirely. *See generally* Nextel Comments.

³ NPRM ¶ 125; Department of Justice Comments at 82-87 (filed November 8, 2004) ("DOJ Comments"); Attorney General of the State of New York Comments at 12-16 (filed November 8, 2004) ("NY AG Comments").

⁴ *See* discussion *infra* at 5-6.

⁵ H.R. Rep. No. 103-827, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500.

Likewise, DOJ's claim that "nothing in either Title III or CALEA authorizes carriers to include in . . . provisioning costs their CALEA implementation costs" should be rejected because a better interpretation of the complicated statutory scheme exists.⁶ Section 229(e) of the Communications Act, which was added by CALEA, provides that a common carrier "may petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of Section 103."⁷ If cost recovery for CALEA implementation costs were prohibited, as DOJ suggests, Section 229(e) would be superfluous. Congress obviously understood that rate-regulated incumbent local exchange carriers recovered the costs of electronic surveillance equipment in their rates and tariffs and intended for this practice to continue for all common carriers.⁸

B. Intercept Provisioning Costs are Recoverable

The Commission sought comment on whether it should examine a carrier's intercept provisioning costs in this proceeding. Nextel believes that an inquiry into carriers' provisioning costs is inappropriate and unnecessary because the applicable state and federal

⁶ DOJ Comments at 90.

⁷ 47 U.S.C. § 229(e).

⁸ The Commission should likewise reject DOJ's suggestion that law enforcement be permitted to pre-approve "a detailed and itemized list of all charges associated with provisioning a given intercept" from carriers. DOJ Comments at 93 ("In order to avoid any further confusion regarding the costs that carriers include in their intercept provisioning costs/charges, DOJ strongly suggests that the Commission require carriers to provide law enforcement agencies with a detailed and itemized list of all charges associated with provisioning a given intercept, to ensure that only permissible costs are included in the charges.").

statutes permit carriers to recover the "reasonable costs" or "reasonable expenses" incurred in intercept provisioning, as discussed below.

NY AG claims "that many carriers are charging the NY AG and other law enforcement agencies far more than their 'reasonable expenses incurred in providing facilities and assistance' to effect authorized intercepts" pursuant to 18 U.S.C. § 2518(4).⁹ Nextel in particular is singled out for criticism. NY AG states that "Nextel charges \$100 for 2,000 minutes (plus unlimited off-peak usage)"¹⁰ and "\$1,500 per target number to set up an intercept, plus a \$250 monthly service fee for the duration of the intercept. If the target subscribes to Nextel's PTT service (DirectConnectSM), an additional \$1,500 setup fee plus \$250 monthly service fee is imposed."¹¹

NY AG further claims that these charges are unreasonable because "[t]he reasonable wireless carrier expenses incurred to execute a warrant should not be significantly more than the same carrier's normal fees to provide basic wireless service to business customers (ranging from \$135 to \$400 monthly), and probably much less (since the intercept is effected with a few keystrokes at a computer terminal.)"¹² All intercept provisioning fees are "needlessly excessive" according to NY AG.¹³ These comments reflect a misreading of

⁹ NY AG Comments at 14 (filed November 8, 2004).

¹⁰ *Id.* at 15 n.45.

¹¹ *Id.* at Exhibit A, ¶ 19 (Affidavit of J. Christopher Prather).

¹² *Id.* at 15.

¹³ *Id.* at Exhibit A, ¶ 18 (Affidavit of J. Christopher Prather)

CALEA and applicable state and federal laws and a fundamental misunderstanding of the economics of intercept provisioning.

The applicable state and federal statutes generally refer to a carrier's right to recover its "reasonable costs" or "reasonable expenses" incurred in providing the technical assistance necessary to meet the government's request. For example, the federal wiretap statute states that carriers "shall be compensated" for the "reasonable expenses incurred" in providing "facilities *or* assistance."¹⁴ The same terms are used in the federal pen register statute.¹⁵ Applicable state statutes provide some variation on this theme. California, for example, provides that the carrier shall be "fully compensated" for its reasonable costs.¹⁶ Other states require compensation "for reasonable expenses incurred,"¹⁷ while others still require compensation at "prevailing rates."¹⁸ These statutes do not distinguish between development costs, implementation costs, and intercept provisioning costs.¹⁹

¹⁴ 18 U.S.C. § 2518(4) (emphasis added).

¹⁵ *Id.* § 3124(c).

¹⁶ West's Ann. Cal. Penal Code § 629.90.

¹⁷ *See e.g.*, C.R.S.A. § 16-15-103 (Colorado); F.S.A. § 934.09 (Florida).

¹⁸ *See e.g.*, 725 ILCS 5/108B-7 (Illinois); IN ST 35-33.5-4-1(c) (Indiana).

¹⁹ There is no need to distinguish CALEA capital costs from specific intercept-related costs as the Commission and DOJ suggest, because both are recoverable under federal and state law. NPRM ¶ 132, DOJ Comments at 87-91 ("Given that there are clear distinctions between CALEA implementation costs and CALEA intercept costs, DOJ believes it is critical for the Commission to clearly distinguish between these costs.").

As Nextel has repeatedly made clear, conducting a wiretap is not simply a matter of flipping a switch or selling a bucket of minutes.²⁰ As required by the Commission's rules, Nextel provides a security office, reachable 24 hours a day, seven days a week, staffed by security professionals to assist with electronic surveillance requests.²¹ The security office responds to thousands of requests for electronic surveillance and production of customer records each year. As provided in court orders and federal and state law, Nextel recovers some portion of its costs of providing a security office available 24 hours a day, seven days a week. The security office is not a profit center and, in fact, Nextel does not fully recover its costs. In addition, Nextel's cost recovery amortizes the capital costs of CALEA equipment over seven years and its intercept provisioning prices do not include many other cost elements recognized under generally accepted accounting principles as part of providing a service.

II. THE COMMISSION LACKS JURISDICTION TO INQUIRE INTO COST RECOVERY MATTERS

In any event, the Commission does not have jurisdiction to inquire into these cost recovery matters. DOJ argues that Section 229(a) of the Communications Act authorizes the Commission to adopt any rules necessary to implement the requirements of CALEA, including cost recovery rules, and urges the Commission specifically to adopt 47 U.S.C.

²⁰ See Nextel Comments at 6; Nextel Communications, Inc. Reply Comments at 4-5, RM-10865 (filed April 27, 2004).

²¹ 47 C.F.R. §§ 64.2100 *et seq.* (implementing 47 U.S.C. § 1006).

§ 1008 into its rules.²² At best, however, the grant of authority to promulgate rules in Section 229(a) is limited by Section 229(e), which permits the Commission to "allow carriers to adjust such charges, practices, classifications, and regulations in order to carry out the purposes of [CALEA]," but only in the context of the Joint Board under Section 229(e).²³ Nothing in the Communications Act permits the Commission to regulate a carrier's charges for recovering the cost of responding to law enforcement requests for provisioning of electronic surveillance.

²² DOJ Comments at 85 (filed November 8, 2004) ("DOJ strongly urges the Commission to adopt rules that mirror – and thereby reinforce – the statutory language in section 109 of CALEA.").

²³ 47 U.S.C. § 229.

CONCLUSION

Nextel continues to support the development of surveillance solutions that help law enforcement accomplish its mission, and, in particular, supports such solutions for PTT services. Nextel urges the Commission, however, to ensure that carriers are able to recover their legitimate costs in providing surveillance capabilities and technical assistance to law enforcement.

Respectfully submitted,

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